

CHAPTER 30

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

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CHAPTER 30

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Outline of Instruction

I. INTRODUCTION.

A. What the USFSPA Does:

1. Allows states to treat disposable military retired pay as marital property or community property.
2. Allows former spouses in some cases to receive their share of military retired pay directly from military finance centers.
3. Allows some former spouses to continue to receive military benefits (commissary and PX/BX privileges as well as health care).
4. Allows former spouses to be designated as SBP beneficiaries.

B. What the USFSPA Does Not Do:

1. Does not require courts to divide military retired pay.
2. Does not establish a formula or award a predetermined share of military retired pay to former spouses.
3. Does not require an overlap of military service and marriage as a prerequisite to division of military retired pay as property.

II. HISTORY.

A. McCarty v. McCarty, 453 U.S. 210 (1981) (states are preempted from dividing nondisability military retired pay)

B. Congress Acts--the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451; see 32 C.F.R. Part 63 (rules regarding direct payment from military finance centers).

1. The USFSPA overrules McCarty by providing that state courts may treat disposable retired pay as marital property. 10 U.S.C. § 1408(c)(1)

2. Effective date: 1 Feb. 83.

C. Gross Pay vs. Disposable Pay

1. What pay is divisible--gross retired pay or "disposable retired pay?"

a) Significance :

[In the following table, assume retired pay is divided equally by the court and that neither party has any other income or are claiming any withholding exemptions]

	<u>Retiree</u>	<u>Spouse</u>
Gross retired pay	\$ 2,000	
VA Disability pay	\$361	
Waived retired pay	(\$361)	
Disposable retired pay	\$1,638	
Division of D.R.P	\$819	\$819
Tax (15% rate)	(\$123)	(\$ 123)
Net after taxes	\$ 1,057	\$696

b) The arguments:

- (1) Disposable: McCarty said courts cannot divide military retired pay, but the USFSPA then said states could divide "disposable retired pay" (DRP); thus, there is no authority to divide anything except the DRP amount.
- (2) Gross: notwithstanding the language about DRP, Congress intended to fully overrule McCarty, and thus states are free to do as they please.

c) The result--several jurisdictions developed case law upholding authority to divide gross pay.

D. Mansell v. Mansell, 490 U.S. 581 (1989).

1. Retired soldiers who are moderately disabled can receive disability benefits from the Veterans Administration; in order to receive these VA benefits, however, they must first waive an equivalent amount of military retired pay.
 - a) These VA benefits are not taxable.
 - b) The VA benefits are not retired pay or "disposable retired pay." See 10 U.S.C. §1408 (a)(4).
 - c) The money waived to receive the VA benefits is excluded from the term "disposable retired pay."
2. Facts of Mansell: Major Mansell divorced his wife in California prior to the McCarty decision. After 23 years of marriage and service, the trial court split the military retirement 50/50. When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following USFSPA, Major Mansell went to court trying to use the act to limit the amount paid to his former spouse.
3. U.S. Supreme Court Holding: the language of 10 U.S.C. § 1408(c)(1) preempts states from dividing the value of the waived military retired pay because it is not "disposable retired pay" as defined by the statute.
4. Dissent.
 - a) This is unfair to former spouses because it allows members unilaterally to shift money from the spouse to the member.
 - b) This is too narrow a view of the USFSPA; it was intended to completely overrule McCarty and restore to states full authority to divide military benefits in any manner they felt appropriate.

III. JURISDICTION.

- A. Courts that can divide military retired pay.
1. A court of competent jurisdiction of any state, DC, PR, Guam, Am. Samoa, the Virgin I., N. Mariana I., & the Trust Terr. of the Pacific.
 2. Any federal court of competent jurisdiction.

3. Any foreign court of competent jurisdiction IF there is a treaty requiring the U.S. to honor court orders of such nation.

--But no such treaty is in force regarding court orders of any nation.

B. Special jurisdictional requirements.

1. There is no USFSPA limitation on a court's jurisdiction in awarding a portion of retired pay for child support or alimony purposes.
2. If retired pay is to be divided as a matter of **property settlement**, jurisdiction is limited to jurisdiction based on one of the following:
 - a) Domicile in the territorial jurisdiction of the court, or
 - b) Residence within the state other than because of military assignment, or
 - c) Consent to jurisdiction.
 - (1) A general appearance constitutes "consent"; the member need not specifically consent to jurisdiction to divide the pension. See, e.g., Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).
 - (2) Continuing jurisdiction may also constitute "consent."
 - (a) Bumgardner v. Bumgardner, 421 So.2d 668 (La. Ct. App. 1988) Court retained continuing jurisdiction to partition military retired pay after the divorce.
 - (b) McDonough v. McDonough, 184 Cal. App. 3d 45, 227 Cal. Rptr. 872 (1986) Court found that it had continuing jurisdiction to partition military retired pay.
 - (c) But Note Tarvin v. Tarvin, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (1986) No continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final.

IV. DIVISIBILITY OF RETIRED PAY.

A. Whose Law Controls?

1. No federal right to a portion of retired pay is created; within broad limitations set by the USFSPA, state law controls whether and how much to divide military retired pay.
 - a) Division to enforce child support obligations.
 - b) Division to enforce alimony obligations.
 - c) Division for property settlement purposes.
2. With the release of significant decisions from the Alabama and Mississippi Supreme Courts in 1993 and 1994, almost every state has now clearly ruled that military retired pay is divisible for property settlement purposes (as well as alimony and child support in appropriate cases). The primary exception to the rule is Puerto Rico, although several states continue to impose a vesting requirement

B. What is the significance of "vesting"?

1. In some states vesting is a prerequisite to division and vesting can occur at different points in the military career (e.g., 18 or 20 years).
2. The majority of the states will generally divide vested or nonvested pensions. Several states require vesting in some form as a prerequisite to division (e.g., Arkansas, Indiana and North Carolina).

C. Disposable Retired Pay.

1. 10 U.S.C. § 1408(c)(1): ". . . a court may treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."
2. USFSPA, 10 U.S.C. § 1408(a)(4): "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which -
 - a) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

- b) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
 - c) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
 - d) are deducted because of an election under chapter 73 of this title [10 U.S.C.S. § 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.
3. "Typical" formula for dividing retired pay is a creation of state law - THERE IS NO FORMULA PROVIDED IN FEDERAL LAW!!!.

$$\frac{1}{2} \times \frac{\text{Length of overlap of marriage and service}}{\text{Time in service}} \times 100 = \%$$

Variations on the standard formula:

$$\frac{1}{2} \times \frac{\text{Length of time the marriage overlaps with military service}}{\text{Length of military service at separation or divorce}} \times 100 = \text{spouse's } \%$$

$$\frac{\text{Spouse's } \% \text{ using standard formula} \times \text{retired pay for rank held at time separation/divorce}}{\text{Actual Retired Pay}} = \%$$

V. DIRECT PAYMENT TO THE FORMER SPOUSE.

- A. For **all** direct payment orders, there must be:
 - 1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement.
 - 2. A statement in the order that the soldier's Soldiers' and Sailors' Civil Relief Act rights were observed (if he or she was not represented in court).
- B. The maximum amount of money directly payable to the former spouse is 50% of the retiree's disposable retired pay.
 - 1. This is a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property.
 - 2. Single or multiple judgments awarding military retired pay as property are considered to be fully satisfied by payments that total 50% of "disposable retired pay."
- C. For direct payment of retired pay awarded as **property**, the following additional requirements apply.
 - 1. A "10 year" test has to be met; there must be at least 10 years of marriage which overlap with 10 years of service creditable toward retirement.
 - 2. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.
 - 3. The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions.
- D. Note - there are no special requirements for a former spouse to receive direct payment of child support and alimony awards.
- E. Tax Treatment of Divisions.
 - 1. As a result of 1992 amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding.
 - 2. Withholding - The finance center will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

VI. ADDITIONAL BENEFITS FOR FORMER SPOUSES.

A. Commissary and PX/BX.

1. 10 U.S.C. §1062: "...an unremarried former spouse...is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."
2. Requirements to qualify.
 - a) Unremarried means "unmarried" for these benefits; termination of a subsequent marriage does revive them.
 - b) 20/20/20 test.
 - (1) 20 years of creditable service by the member, **and**
 - (2) 20 years of marriage, **and**
 - (3) 20 years of overlap between marriage and the creditable service.
 - c) The date of the divorce is irrelevant

B. Medical Benefits.

1. 10 U.S.C. §§ 1072, 1078 & 1086.
2. Three categories of health care.
 - a) Full military health care program, including CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.
 - b) Transitional health care: full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.
 - c) The DOD Continued Health Care Benefit Program (CHCBP) insurance plan that has been negotiated by DOD.
3. Requirements to qualify for **full military health care** program.
 - a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does **not** revive health care benefits, but an annulment does.

- b) 20/20/20 test (or, 20/20/15 test and divorce dated before 1 April 1985).
- c) Not enrolled in an employer-sponsored health insurance plan.
- d) As in the case of commissary and PX benefits, the date of the divorce is irrelevant.

4. Requirements for **transitional health care**.

- a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does **not** revive health care benefits, but an annulment does.
- b) 20/20/15 test.
 - (1) 20 years of creditable service by the member, **and**
 - (2) 20 years of marriage, **and**
 - (3) 15 years of overlap between marriage and the creditable service.
- c) Not enrolled in an employer-sponsored health insurance plan.
- d) To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

5. Requirements for **DOD Continued Health Care Benefit Program (CHCBP)**.

- a) Eligibility: anyone who loses entitlement to military health care (e.g., former spouses, non-career soldiers and their family members, etc.)
- b) Concept: premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program (it is not, however, part of CHAMPUS).
 - (1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former spouses and others who no longer qualify as dependents qualify for 36 months coverage).
 - (2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing CHAMPUS benefits.

- (3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

VII. SURVIVORS' BENEFIT PLAN.

A. Original USFSPA provisions.

1. Member could designate a former spouse as an SBP beneficiary, but only on the basis of a person with an insurable interest.
2. The designation had to be voluntary: "Nothing in this chapter [USFSPA] authorizes any court to order any person to elect under [10 U.S.C. § 1448(b)]...to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election."

B. Amendments to the original provisions.

1. Now a former spouse can be designated an SBP beneficiary in the same category that applies to current spouses, so the "natural person with an insurable interest" offset does not apply.
2. Additionally, a court can now order a retiring soldier to designate the former spouse as an SBP beneficiary--the election need not be voluntary.
 - a) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A).
 - b) Once a timely request is made, the finance center will flag the service member's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary.

VIII. USFSPA AND SEPARATION INCENTIVES.

- ### **A.**
- In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered annual payments (voluntary separation incentive or VSI) or a lump sum (special separation benefit or SSB) if they elect to leave active duty voluntarily. Are these payments divisible as marital property?
1. Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA.

2. Trend is to divide these benefits using rationale of USFSPA cases.
 - a) Marsh v. Wallace, 924 S. W.2d 423 (Tex. Ct. App. 1996). Texas court divided lump sum SSB payment giving former spouse the same percentage of the SSB she would have received of retirement pay. The court found that the SSB was “in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future.”
 - b) Kelson v. Kelson, 675 So. 2d 1370 (1996), rehearing denied. Overruling an earlier ruling in this case, the court divided VSI benefits with former spouse. While specifically finding the VSI payments were not covered by the USFSPA, the court did find that as a practical matter VSI payments “are the functional equivalent of the retired pay in which [the former spouse] has an interest.”
 - c) But See McClure v. McClure, 647 N.E. 2d 832 (Ct. App. Ohio 1994). The court found VSI payments to be like severance pay and since the VSI payments came after the divorce proceedings began they were separate property of the husband.
3. There is no federal preemption. The statutes authorizing VSI/SSB do not preclude the states from treating the payments as marital property.

IX. USFSPA AND DOMESTIC ABUSE CASES.

- A. 10 U.S.C. §1408(h). Allows for former spouses to collect their portion of retirement pay (and other benefits) even though the service member does not retire due to domestic abuse.
- B. Requirements to qualify.
 1. Court order awarding as **property settlement** a portion of disposable retired pay.
 2. Military member is eligible **by years** for retirement but loses right to retire due to misconduct involving dependent abuse.
 3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.
- C. Benefits.
 1. Retirement pay as certified by the Secretary of the Service determined by amount member would have received if retired upon date eligible.
 2. PX.

3. Commissary.
4. Medical and Dental.
5. Legal Assistance.
6. These benefits terminate upon remarriage but can be revived by divorce, annulment or death of the subsequent spouse.

D. Procedures.

1. DFAS treats these just like any other **direct payment** request.
2. Must meet the requirements for direct payment of property settlement, remember the 10 year test.
3. Use the same USFSPA application for payment as any other former spouse.

X. FY 97 CHANGES TO USFSPA.

A. Service on DFAS.

1. Original provisions required return receipt requested certified mail for all service on DFAS.
2. Now amended to allow for regular mail, e-mail, fax, or certified mail service on DFAS. This will ease communications between former spouses, service members and DFAS.

B. Multiple Court Orders.

1. New amendments prohibit DFAS from honoring an out of state modification of an order upon which 1408 payments are based unless the out of state court has jurisdiction over both the military member and the spouse or former spouse by domicile, residence other than by military assignment or consent.
2. Prohibits forum shopping and confusion resulting in delay of payments administered by DFAS.

C. Civil Service and Federal Retirement.

1. Amendments to 5 U.S.C. §8332 (Civil Service Retirement Act) and 5 U.S.C. §8411 (Federal Employees Retirement Act).

2. Can no longer count your years of military service towards a civilian federal retirement unless you authorize the Office of Personnel Management (OPM) to deduct an amount for the former military spouse.
3. OPM must promulgate rules for execution of this provision.

XI. CONCLUSION.

APPENDIX A

Uniformed Services Former Spouses' Protection Act¹	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes³			
	Number of Years			
Benefits for Former Spouses²	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay ⁴	X	X	X	X
Designation as an SBP Beneficiary ⁵	X	X	X	X
Direct Payment ⁶				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division ⁷		X	X	X
Health Care ⁸				
Transitional ⁹			X	
Full ¹⁰				X
Insurance ¹¹	X	X	X	X
Commissary ¹²				X
PX ¹²				X
Dependent Abuse				
Retired Pay Property Share Equivalent ¹³		X	X	X
Transitional Compensation ¹⁴	X	X	X	X

FOOTNOTES

- ¹. Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).
- ². For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.
- ³. Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).
- ⁴. At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).
- ⁵. Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.
- ⁶. See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.
- ⁷. While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).
- ⁸. To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

⁹. "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

¹⁰. "Full health care" includes health care at military treatment facilities and that provided through the CHAMPUS insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

¹¹. Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal Year 1993 (see 10 U.S.C. § 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the basic CHAMPUS program, but CHCBP is not part of CHAMPUS. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

¹². Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

¹³. When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

¹⁴. The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

APPENDIX B

State-by-State Analysis of the Divisibility Of Military Retired Pay¹

On 30 May 1989, the United States Supreme Court announced its decision in Mansell v. Mansell.² In Mansell, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.³ The Court's decision clarifies that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4).⁴ When using the following materials, remember that Mansell effectively overrules some of the listed caselaw predating the decision, at least to the extent a case suggests state courts have the authority to divide more than disposable retired pay. Since Mansell, courts have generally recognized the limitations of the disposable retired pay definition found in Title 10. For example, in Torwich v. Torwich, a New Jersey appellate court wrestled with the impact that waiver of military retired pay associated with receipt of VA benefits has on disposable retired pay.⁵ Also, in Knoop v. Knoop,⁶ the North Dakota Supreme Court addressed a situation involving the impact of the Dual Compensation Act⁷ on disposable retired pay.⁸

¹This note updates the Note, "State-by-State Analysis of the Divisibility of Military Retired Pay," ARMY LAW., Jul. 1994, at 41. It was developed with the assistance of military attorneys, active and reserve, and civilian practitioners located throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

²490 U.S. 581 (1989).

³Id. at 594.

⁴Id. at 589.

⁵660 A.2d 1214 (N.J. Super. 1995). See also TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce*, Army Law., Oct. 1995, at 28.

⁶542 N.W.2d 114 (N.D. 1996).

⁷5 U.S.C.A. §§ 5531-5404.

⁸See also, TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, Army Law., Mar. 1996, at 133.

Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property, Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with Vaughn are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1982). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note also Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension--the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California Gillmore decision). Also see Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) which held that while Mansell precludes division of disability benefits received in lieu of retirement pay, it does not preclude consideration of these payments when making an equitable division of marital assets.

Arizona

Divisible. DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Edsall v. Superior Court of Arizona, 143 Ariz. 240, 693 P.2d 895 (1984); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not he or she does retire at that point.

Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); but see Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested"). Also see Burns v. Burns, 31 Ark. 61, 847 S.W.2d 23 (1993) (In accord with Durham, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

California

Divisible. In re Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident servicemember did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) and Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible; In re Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In re Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from Mansell v. Mansell, 490 U.S. 581 (1989), the court held that gross retired pay was divisible since it was based on a stipulated property settlement to which res judicata had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (In re Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); In re Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977)), but the Mansell case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes eligible to retire, or anytime thereafter, even if the member remains on active duty. In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); see also In re Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. In re Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). See also In re Hunt, 909 P.2d 525, (Colo. 1996), reversing a previous decision of its own, the Colorado Supreme Court holds that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

Connecticut

Probably divisible. Conn. Gen. Stat. 46b-81 (1986) gives courts broad power to divide property. Note Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Divisible. See Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in Deloach v. Deloach, 590 So.2d 956 (Fla. Dist Ct. App. 1991).

Georgia

Probably divisible. Cf. Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations) see also Hall v. Hall, 51B.R. 1002 (1985) (Georgia divorce judgment awarding debtor's wife 38% of debtor's military retirement, payable directly from the United States to the wife, granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," citing Stumpf and Courtney, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

Hawaii

Divisible. Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the order. In Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that Mansell's limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that Mansell applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by Griggs v. Griggs, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent Mansell's limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). See Leatherman v. Leatherman, 122 Idaho 247, 833 P.2d 105 (1992). A portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit and thus subject to statute relating to modification of divorce decrees to include division of military retirement benefits. Also see Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995)(cert. denied by the U.S. Supreme Court, 116 S.Ct. 179 (mem.) (affirming a lower court decision ordering a servicemember to pay spouse her community share of the military pension, even though he had decided to put off retirement), Mosier v. Mosier, 122 Idaho 37, 830 P.2d 1175 (1992), and Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991).

Illinois

Divisible. In re Brown, 225 Ill. App. 3d 733, 587 N.E.2d 648 (1992); the Court cites Congress' enactment of the Spouses' Protection Act (Pub.L. No. 97-252, 96 Stat. 730-38 (1982)) as the basis to permit the courts to treat pay of military personnel in accordance with the law of the jurisdiction of the court (In re Dooley, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985)). The court in Brown held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See In re Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). Korper points out that under Illinois law a pension is marital property even if it is not vested. In Korper, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point); see In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible, but watch for vesting requirements. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share (Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. In re Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). See also Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But see Sable v. Sable, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Divisible. See especially In re Howell, 434 N.W.2d 629 (Iowa 1989). In Howell, the member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code..." (emphasis added). The U.S. Supreme Court's Mansell decision may have overruled state court decisions holding courts have authority to divide gross retired pay.

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994), applying Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). The Iowa Court of Appeals ruled: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); In re Harrison, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); Ky. Rev. Stat. Ann. § 403.190 (1994), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); Warner v. Warner, 651 So. 2d 1339 (La. 1995) (confirming that 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment, but not to award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983). See also Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can not divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the Mansell concerning divisibility of gross retired pay).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). See also Me. Rev. Stat. Ann. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Divisible. Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law; see Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981)). See also Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. Andrews v. Andrews, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. Keen v. Keen, 160 Mich. App. 314, 407 N.W.2d 643 (1987); Giesen v. Giesen, 140 Mich. App. 335, 364 N.W.2d 327 (1985); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note also Boyd v. Boyd, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property left to the trial court).

Minnesota

Divisible. Military retired pay not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but Mansell may have overruled state court decisions that they have the authority to divide gross retired pay. Note also Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). In July, 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley 639 So. 2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." This includes military pensions which are viewed as personal property and while USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995). In Pierce, the Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Since property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. In re Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); In re Miller, 37 Mont. 556, 609 P.2d 1185 (1980), vacated and remanded sub. nom. Miller v. Miller, 453 U.S. 918 (1981).

Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

Nevada

Divisible. All retirement benefits are divisible community property, whether vested or not, and whether matured or not. Forrest v. Forrest, 608 P.2d 275 (Nev. 1983). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989); Sertic v. Sertic, 901 P.2d 148 (Nev. 1995). Partition of previously undivided benefits was considered doubtful, under a case that held a silent decree to be *res judicata* of **non**-division of the retirement benefits. Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986). However, without mentioning that opinion, the Nevada Supreme Court has since held that the parties to a divorce remain tenants in common of all assets omitted from the decree, whether by fraud or simple mistake. Amie v. Amie, 796 P.2d 233 (Nev. 1990); Williams v. Waldman, 836 P.2d 614 (Nev. 1992).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets...belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes...employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution...." N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), aff'd, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (N.M. 1983)(USFSPA applied); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). See also White v. White, 105 N.M. 800, 734 P.2d 1283 (Ct. App. 1987) (court can award share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay). In Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (1987), in dicta the court cited the California Gillmore case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire - even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., Damiano v. Damiano, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; e.g., Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984).

North Carolina

Divisible. The vesting requirement contained in the old N.C. Gen. Stat. § 50-20(b) (1988) which expressly declared vested military pensions to be marital property; **was changed by new legislation. For all equitable distribution cases filed after 1 October 1997, there is no vesting requirement to divide military pensions.** For cases filed prior to 1 October 1997 old vesting rules apply. Those old rules require the pension be vested as of the date the parties separate from each other. In Milam v. Milam, 373 S.E.2d 459 (N.C.App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In George v. George, 444 S.E.2d 449 (N.C.App. 1994), the court held that an enlisted member's right to retirement benefits vests when he/she has completed twenty years of service. In Lewis v. Lewis, 350 S.E.2d 587 (N.C.App. 1986) the court held that a divorce court can award a spouse a share of gross retired pay, but, because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay; Mansell, 490 U.S. at 589, may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay, even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C.App. 1992). Attorneys considering valuation issues should also review Bishop v. Bishop, 440 S.E.2d 591 (N.C.App. 1994), which held that valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). See also Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to 17-year spouse is affirmed), and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that definition of "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property, but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." Knoop is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

Ohio

Divisible. See Lemon v. Lemon, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property **where some evidence of value demonstrated**). But also see, King v. King, 78 Ohio App. 3d 599, 605 N.E.2d 970 (1992) (Trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value demonstrated); Cherry v. Figart, 86 Ohio App. 3d 123, 620 N.E.2d 174 (1993) (distinguishing King by affirming division of nonvested pension where parties had agreed to divide the retirement benefits and suit was brought for enforcement only - the initial judgment incorporating the agreement had not been appealed); and Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

Oklahoma

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible, Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Divisible. In re Manners, 68 Or. App. 896, 683 P.2d 134 (1984); In re Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980). See also In re Richardson, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R.Dec. 765), overruling Torres v. Robles, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling Torres, the court in Delucca reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in Maldonado v. Superior Court, 100 P.R.R. 369 (1972). Also see Carrero v. Santiago, 93 JTS 103 (1993) (citation to original Spanish version; English translation not yet available), which cites Delucca v. Colon with approval. Note that pensions may be considered in setting child support and alimony obligations.

Rhode Island

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

South Carolina

Divisible. Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division, Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to participate in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). But see Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible--in this case, it was reserve component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). See generally Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) specifically defines all vested pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that non-vested military pensions can properly be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn.Ct.App. 1994).

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)(Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran. Justice White in dissent argued unsuccessfully that the state's authority was preempted by the bar to garnishing VA disability payments, and federal discretion to divert some of the VA benefits to family members in certain cases.))

Texas

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). See also Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; Mansell may have overruled Grier in part). Pensions need not be vested to be divisible. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with Mansell.

Utah

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay. But see Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount he had overwithheld from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by...equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." The Connecticut Supreme Court recently held in Krafik v. Krafik, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although the issue was not raised in Krafik, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. See also Mitchell v. Mitchell, 4 Va. App. 113, 355 S.E.2d 18 (1987); Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division). Also see Owen v. Owen, 419 S.E.2d 267 (Va.Ct.App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay - held not to violate Mansell).

Washington

Divisible. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); In re Smith, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay)

Wisconsin

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). See also Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

Wyoming

Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property). See also Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (Affirms award of 100% of "disposable retired pay" to former spouse as property, but acknowledges that only 50% of this award can be paid directly. Note that this holding is inconsistent with 1990 amendment to USFSPA at 10 USC § 1408(e)(1) which deems all orders dividing military retired pay as property satisfied once a threshold of 50% of the "disposable retired pay" is reached - see the discussion in Knoop v. Knoop referenced under the North Dakota section of this guide.)

Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

Appendix C

Extract From Army OTJAG Message
Subject: Division of Military Retirement/VS/SSB in
Divorce Proceedings
(Minor editing to incorporate changes in state court
positions incorporated by
The Judge Advocate General's School,
Administrative & Civil Law Dept.)

HQ DA WASH DC //DAJA-LA//

UNCLAS

FOR SJA/JA/LEGAL COUNSEL

SUBJECT: DIVISION OF MILITARY RETIREMENT PENSIONS/VS/SSB IN DIVORCE PROCEEDINGS

1. LEGAL ASSISTANCE ATTORNEYS (LAA'S) ADVISING CLIENTS CONTEMPLATING SEPARATION OR DIVORCE MUST DISCUSS THE ISSUE OF THE DIVISIBILITY OF THE SERVICE MEMBER'S MILITARY RETIREMENT PENSION REGARDLESS OF WHICH SPOUSE IS BEING ADVISED. SOME GENERAL KNOWLEDGE REGARDING THE HANDLING OF THIS ISSUE BY THE VARIOUS STATES IS THEREFORE ESSENTIAL. THE PURPOSE OF THIS MESSAGE IS TO ALERT YOU TO SOME RECENT--AND NOT SO RECENT-- DEVELOPMENTS IN THIS AREA.

2. SOME SERVICE MEMBERS WITH "NONVESTED PENSIONS" (ALSO CALLED "UNVESTED") MAY WISH TO RELY ON THE LAWS OF THOSE STATES THAT, ALTHOUGH THEY ALLOW MILITARY PENSION DIVISION, DO SO ONLY IF THE PENSION IS VESTED. THESE STATES WILL NOT DIVIDE A MILITARY PENSION UNLESS IT HAS VESTED BY THE "DATE OF CLASSIFICATION". THE DATE OF CLASSIFICATION IS THE DATE OF THE EVENT UNDER APPLICABLE STATE LAW THAT DETERMINES HOW THE COUPLE'S PROPERTY WILL BE CLASSIFIED FOR PURPOSES OF DISPOSITION IN THE DIVORCE. THIS MAY BE THE DATE OF MARRIAGE BREAKDOWN, SEPARATION, SUMMONS ISSUANCE, OR DIVORCE. VESTING UNDER STATE LAW USUALLY OCCURS AT THE EIGHTEENTH OR TWENTIETH YEAR OF MILITARY SERVICE--THAT IS WHEN A MEMBER IS "LOCKED IN" AND IS "ENTITLED" TO SERVE UNTIL RETIREMENT. IF VESTING HAS NOT OCCURRED BY THE APPLICABLE DATE OF CLASSIFICATION, THEN THE SERVICE MEMBER CAN AVOID DIVISION OF THE PENSION. STATES THAT REQUIRE VESTING OF MILITARY RETIREMENT PENSIONS INCLUDE NORTH CAROLINA, ARKANSAS, INDIANA, TENNESSEE, AND COLORADO. (CHECK THE MOST RECENT FAMILY LAW GUIDE'S "STATE-BY-STATE ANALYSIS" PUBLISHED BY TJAGSA TO GET A COMPLETE LIST OF STATES.)

3. THE VAST MAJORITY OF STATES DO NOT RELY ON "VESTING" BY THE APPLICABLE CLASSIFICATION DATE IN ORDER TO DIVIDE A MILITARY PENSION. IN

NEW HAMPSHIRE, FOR EXAMPLE, WHERE BOTH VESTED AND NONVESTED PENSION RIGHTS ARE DIVISIBLE (N.H. REV. STAT. ANN. 458.16-A), A DIVORCE COURT DIVIDED THE PENSION RIGHTS OF AN AIR FORCE MAJOR WITH TEN YEARS OF CREDITABLE SERVICE (HALLIDAY V. HALLIDAY, 593 A.2D 233 (N.H. 1991)). IN A NEW JERSEY CASE, AN APPELLATE COURT HELD THAT THE NONVESTED MILITARY RETIREMENT RIGHTS OF A SERGEANT WITH 16 YEARS OF ACTIVE DUTY WERE DIVISIBLE MARITAL PROPERTY. WHITFIELD V. WHITFIELD, 222 N.J. SUPER. COURT. 36, 535 A.2D 986 (N.J. SUPER. CT. APP. DIV. 1987).

4. ALTHOUGH OVERTURNED BY SUBSEQUENT MISSISSIPPI DECISIONS RECOGNIZING THE AUTHORITY TO DIVIDE MILITARY PENSIONS AS PROPERTY, THE MISSISSIPPI SUPREME COURT'S DECISION IN FLOWERS V. FLOWERS, S.CT. MISS, NO. 91-CA-1154, 1993 MISS. LEXIS 426 (SEP 30, 1993) IS INSTRUCTIVE ON THE ISSUE OF CHOICE OF LAW. LAA'S WHO READ THE OPINION CLOSELY WILL APPRECIATE ITS EMPHASIS ON "CHOICE OF LAW" IN PENSION DIVISION LITIGATION: "WHERE THE SERVICEMAN HAD HIS DOMICILE IN A COMMUNITY PROPERTY STATE FOR ALL OR PART OF THE TIME HE SERVED IN THE ARMED FORCES, THIS STATE WILL RESPECT RIGHTS THE LAW OF SUCH STATE VESTS IN THE SERVICEMAN'S FORMER SPOUSE." DO NOT ALWAYS ASSUME THAT THE LAW OF THE FORUM GOVERNS IN PENSION DIVISION. LOOK AT THE LAW OF THE SERVICE MEMBER'S DOMICILE AND, IF DIFFERENT FROM--AND MORE FAVORABLE THAN--THAT OF THE FORUM, MAKE AN ARGUMENT, WHEN DRAFTING SEPARATION AGREEMENTS, FOR APPLYING "DOMICILE LAW" TO THE ISSUE RATHER THAN "FORUM LAW."

5. LAA'S SHOULD ALSO BE PREPARED TO ADDRESS THE ISSUE OF THE DIVISIBILITY OF VOLUNTARY SEPARATION BONUSES (I.E., THE VOLUNTARY SEPARATION INCENTIVE (VSI) AND THE SPECIAL SEPARATION BENEFIT (SSB)) WHEN COUNSELING CLIENTS ABOUT DIVORCE AND WHEN PREPARING SEPARATION AGREEMENTS.

A. THERE IS AN ISSUE AS TO WHETHER THE VSI OR SSB IS DIVISIBLE MARITAL PROPERTY BASED ON THE WORDING OF 10 U.S.C. SEC. 1408(C)(1), WHICH LIMITS STATES TO THE DIVISION OF "DISPOSABLE RETIRED PAY." THUS, THE LAW WHICH APPLIES TO SEPARATION BONUSES IS PRE-UNIFORMED-SERVICES-FORMER-SPOUSES'-PROTECTION-ACT (USFSPA) LAW UNDER THE MCCARTY DECISION, LEAVING THE BONUSES (PROBABLY) NOT DIVISIBLE UNLESS CONGRESS SAYS OTHERWISE. CONGRESSWOMAN SCHROEDER SPONSORED AN AMENDMENT TO H.R. 5006, THE D.O.D. REAUTHORIZATION BILL FOR FY 1993, WHICH WOULD HAVE MADE THE USFSPA APPLICABLE TO BOTH VSI AND SSB. ALTHOUGH SUPPORT ON THE HOUSE ARMED SERVICES COMMITTEE FOR PASSAGE OF THIS AMENDMENT AT THAT TIME APPARENTLY WAS LACKING, IT WILL PROBABLY BE REINTRODUCED IN THE 103RD CONGRESS.

B. DESPITE 10 U.S.C. SEC. 1408(C)(1), SOME COURTS ARE DIVIDING VSI AND SSB IN DIVORCE CASES (SEE, E.G., "COURT GIVE EX-SPOUSES PART OF EXIT BONUSES," NAVY TIMES, 16 AUG 93, AND DRINGMAN V. DRINGMAN, PIMA COUNTY (ARIZONA) SUPERIOR COURT NO. D-70901, JUDGMENT FILED 10 AUGUST 1993). A RECENT TEXAS CASE ALSO DIVIDED THE VSI AS A COMMUNITY PROPERTY

ASSET. SOME SERVICE MEMBER CLIENTS MAY HAVE EXISTING COURT ORDERS FOR PENSION DIVISIONS AND INQUIRE AS TO WHETHER THEY CAN NOW "DEFEAT" THIS DIVISION BY ACCEPTING A VSI OR SSB. WITHOUT STATUTORY AND/OR CASE LAW AUTHORITY WHICH PROVIDES THAT SUCH PAYMENTS ARE NOT DIVISIBLE AS MARITAL PROPERTY, THE CLIENT SHOULD CONSIDER THAT A JUDGE MIGHT INCLUDE THE SEPARATION BONUS UNDER THE EXISTING ORDER.

C. IF A COURT, REGARDLESS OF STATUTORY AUTHORIZATION OR FEDERAL PREEMPTION, DIVIDES VSI AND SSB, THEN SEVERAL ANALYSES ARE POSSIBLE AS BASES FOR THE DIVISION. SOME COURTS HAVE HELD THAT SEVERANCE PAY IS NOT MARITAL PROPERTY SINCE IT TAKES THE PLACE OF FUTURE COMPENSATION, RATHER THAN BEING FOR PAST SERVICES (LIKE RETIREMENT PAY AND OTHER DEFERRED COMPENSATION BENEFITS). IN RE MARRIAGE OF DE SHURLEY, 255 CAL. RPTR. 150, 207 CAL.APP.3D 992 (1989) AND IN RE MARRIAGE OF LAWSON, 256 CAL.RPT. 283, 208 CAL.APP.3D 446 (1989).

D. IF, ON THE OTHER HAND, VSI AND SSB ARE SEEN AS AN ECONOMIC BENEFIT EARNED DURING THE MARRIAGE AND ATTRIBUTABLE TO MARITAL WORK, EFFORTS, AND LABOR, THEY MAY BE SEEN AS DAMAGES FOR AN ECONOMIC LOSS TO THE MARRIAGE. THIS IS CALLED THE "ANALYTIC APPROACH" AND IS MOST OFTEN APPLIED IN THE PERSONAL INJURY AREA. JOHNSON V. JOHNSON, 317 N.C 437, 846 S.E.2D 430 (1986). IN AN ARKANSAS CASE INVOLVING SEVERANCE PAY, THE WIFE WAS GRANTED ONE-HALF OF THE HUSBAND'S LUMP-SUM PAYMENT BECAUSE THE JUDGE DETERMINED THAT THE BENEFIT WAS EARNED BY SERVICE DURING THE MARRIAGE. DILLIARD V. DILLIARD, 772 S.W.2D 355 (ARK.CT.APP.1989) SEE ALSO CHOTINER V. CHOTINER, 829 P.2D 829 (ALASKA 1992). EVEN IF THE PAYMENT IS MARITAL PROPERTY AND THEREFORE DIVISIBLE, ONE WOULD NEED TO APPLY THE MARITAL FRACTION (YEARS OF MARITAL SERVICE OVER TOTAL YEARS OF SERVICE) TO THE LUMP-SUM PAYMENT TO ARRIVE AT THE PORTION THAT IS MARITAL.

E. SOME COURTS IN "VESTING STATES" TAKE THE POSITION THAT THE SEVERANCE PAY MUST BE AUTHORIZED OR RECEIVED ON OR BEFORE THE DATE OF CLASSIFICATION (AS DISCUSSED IN PARAGRAPH 2 ABOVE) IN ORDER FOR THE COURT TO BE ABLE TO DIVIDE IT; IF IT IS AUTHORIZED OR RECEIVED AFTER THAT DATE, IT IS NOT MARITAL PROPERTY AND IS NOT DIVISIBLE. (SEE, E.G., BOGER V. BOGER, 103 N.C.APP 340, 450 S.E. 2D 591 (1991).

F. LAA'S SHOULD BE AWARE THAT DFAS WILL NOT GARNISH VSI OR SSB UNDER 10 U.S.C. SEC. 1408(D) PURSUANT TO COURT ORDERS FOR PROPERTY DIVISION. ONLY MILITARY RETIREMENT PAY CAN BE GARNISHED UNDER 10 U.S.C. SEC. 1408(D). THERE ARE SEVERAL OTHER ALTERNATIVES FOR GARNISHING THE VSI AND SSB. PUBLIC LAW 103-94, WHICH PROVIDES FOR INVOLUNTARY ALLOTMENTS FROM MILITARY PAY FOR JUDGMENT INDEBTEDNESS, MAY BE USED AFTER APRIL 1994 FOR GARNISHING PURSUANT TO A COURT ORDER DIVIDING THE VSI OR SSB. IF THE COURT ORDER IS FOR CHILD SUPPORT AND/OR SPOUSAL SUPPORT THE VSI AND SSB CAN BE GARNISHED UNDER EITHER 42 U.S.C. SEC. 659, WHICH IS THE GARNISHMENT STATUTE OR 42 U.S.C. SEC. 665, WHICH IS THE INVOLUNTARY ALLOTMENT STATUTE.

6. WHEN COUNSELING CLIENTS ABOUT DIVORCE, LAA'S MUST CONSIDER ALL THE OPTIONS AVAILABLE TO THE CLIENT AND TO THE CLIENT'S SPOUSE. IN MANY MARRIAGES THE MILITARY PENSION OFTEN IS THE LARGEST ASSET OF THE PARTIES. RECOMMENDING A CLIENT FILE A DIVORCE IN A PARTICULAR JURISDICTION FOR FAVORABLE TREATMENT IN PENSION DIVISION MAY ULTIMATELY COST OR SAVE A CLIENT HUNDREDS OF THOUSANDS OF DOLLARS OVER A LIFETIME. IT MAY ALSO RESULT IN LITIGATION, PERHAPS NEEDLESS, IN MORE THAN ONE JURISDICTION OVER THE DIVORCE, PROPERTY RIGHTS, AND RELATED MATTERS.

7. IN TWO COMMUNITY PROPERTY STATES, COURTS HAVE REOPENED DIVORCE CASES FROM 1966 (CALIFORNIA) AND 1973 (NEW MEXICO) AND DIVIDED MILITARY PENSIONS WHERE THE ORIGINAL PROPERTY SETTLEMENTS DID NOT ADDRESS THE MILITARY RETIREMENT PENSION. BOTH COURTS RELIED ON THE FACT THAT THE SETTLEMENT FAILED TO MENTION THE MILITARY RETIREMENT PENSION AS MARITAL PROPERTY (SEE 1993 CAL. LEXIS 217. THE NEW MEXICO CASE IS NOT YET PUBLISHED.) MILITARY RETIREES WITH PRE-EXISTING PROPERTY SETTLEMENTS PREDATING THE USFSPA SHOULD BE REFERRED TO CIVILIAN ATTORNEYS WHO ARE VERY FAMILIAR WITH SUCH ISSUES IN THE APPLICABLE JURISDICTIONS.

8. LAA'S SHOULD CLEARLY ADDRESS THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB IN SEPARATION AGREEMENTS. THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB SHOULD BE BE DIVIDED, NOT DIVIDED (WITH INTERESTS WAIVED), OR JURISDICTION OF THE ISSUES RESERVED FOR FUTURE NEGOTIATION REGARDLESS OF WHICH SPOUSE THE LAA IS ASSISTING. DRAFTING A SEPARATION AGREEMENT THAT IS SILENT ON SUCH ISSUES, REGARDLESS OF WHICH SPOUSE IS REPRESENTED, OPENS THE DOOR TO A LEGAL MALPRACTICE CLAIM. NEVERTHELESS, IF FOR A TACTICAL REASON A LAA PREPARES A SEPARATION AGREEMENT THAT IS SILENT ON THE ISSUES OF VSI AND SSB, THE LAA SHOULD COUNSEL THE CLIENT APPROPRIATELY AND MAKE A MEMORANDUM FOR THE RECORD ABOUT THE COUNSELING.

APPENDIX D

OJAG Legal Assistance (Code 36)
(703) 325-7928/DSN 221-7928
8 July 1994

QUICK GUIDE TO UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Note: This **Quick Guide to USFSPA** was first issued, in a slightly different version, for distribution at the Navy JAG Conference in March 1992. Following modest revision to include points of contact for other than the naval services, it was published in **The LAMPlighter**, a quarterly newsletter published by the American Bar Association Standing Committee on Legal Assistance for Military Personnel (Vol. 4, No. 1 - Fall 1992). It is intended to serve as a desktop guide and starting point for research into the regulations and interpretive case law that flesh out USFSPA.

Background:

The Uniformed Services Former Spouses' Protection Act (USFSPA), passed by Congress in 1982 and amended a number of times since then, is intended to place the former spouse in substantially the same position that he or she would have been in during the military retirement period had the marriage not been ended by divorce, dissolution or annulment. The statute seeks to accomplish this by:

1. Allowing the states to treat disposable military retired pay as marital or community property, per each state's law; note that there is no federal right to any portion of military retired pay under USFSPA.
2. Allowing certain former spouses to receive their share, up to a ceiling of 50%, of disposable military retired pay directly from military finance centers.
3. Allowing some former spouses to continue receiving commissary, exchange, and health care benefits.
4. Allowing former spouses to be designated as Survivor Benefit Plan beneficiaries.
5. Authorizing certain former spouses who are victims of abuse to receive a court-ordered share of military retired pay even though the military member was not retired, but rather was punitively or administratively because of the misconduct involving abuse (special rules and requirements apply).

Discussion:

A. KEY CONCEPTS AND TERMS

1. **Disposable Retired Pay.** 10 U.S.C. § 1408(a)(4), 32 C.F.R § 63.6e(2), Military Retired Pay Manual, DoD 1340.12M. This is gross retired pay entitlement less various authorized deductions. A change in 10 U.S.C. § 1408(a)(4) (amendment of 5 November 1990, Pub.L. 101-510, § 555; 104 Stat. 1569) modified the definition of disposable retired

pay for divorces final after 3 February 1991 to include only the following authorized deductions:

- a. Amounts owed by the member to the United States that are related to the receipt of retired pay (e.g., recoupment of overpayments).
- b. Forfeitures ordered by a court-martial.
- c. That portion which is military disability retired pay under 10 U.S.C. Chapter 61.
- d. That portion which is waived in favor of accepting Veterans' Affairs disability pay.
- e. Premiums paid for Government life insurance, or deductions to provide SBP annuity coverage in favor of a current or former spouse.
- f. Other amounts required by law to be deducted that relate to a person's entitlement to retired pay (e.g., dual compensation restrictions).

For divorces final prior to 3 February 1991, the authorized deductions to compute disposable retired pay differ significantly, and include: Federal employment taxes and income taxes withheld, including properly documented supplemental withholding consistent with the member's expected tax liability; and State employment taxes and income taxes withheld when the member voluntarily requests same and the military service has entered into an agreement with the particular State to withhold from retired pay.

2. 20/20/20 Former Spouse: the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 20 years. Certain "basic benefits" accrue to 20/20/20 former spouses; see next section.

3. 20/20/15 Former Spouse: the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 15 years. Limited "basic benefits" accrue to 20/20/15 former spouses; see next section.

4. 10/10 Former Spouse: the spouse has been married to the military member for at least 10 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 10 years. The only significance of this status is that it is the minimum eligibility criteria for obtaining direct payment from the military finance center of a former spouse's court-ordered share of disposable retired pay.

B. BASIC BENEFITS

1. **Commissary and Exchange Benefits.** 10 U.S.C. §§ 1062 and 1072(2)(F).

Unremarried former spouse is treated the same as the military retiree; i.e., the 20/20/20 former spouse is authorized full commissary and exchange benefits. While these benefits are suspended upon subsequent marriage, the privileges "revive" when the subsequent marriage is terminated in any manner. These benefits are not available to 20/20/15 former spouses.

2. **Medical Benefits.** 10 U.S.C. §§ 1072(2)(F), 1076 and 1086. Unremarried former spouse is treated the same as the spouse of deceased military retiree. The 20/20/20 former spouse (and a 20/20/15 former spouse whose divorce was final prior to 1 April 1985) is authorized full medical care, including space-available inpatient and outpatient care at military treatment facilities, and CHAMPUS coverage (until the former spouse becomes eligible for Medicare). These benefits are *extinguished* upon subsequent marriage, so the privileges will not "revive" when the subsequent marriage is terminated by any cause other than annulment. The unremarried 20/20/15 spouse is entitled to full military medical benefits only for a transitional period of 1 year, after which the former spouse may purchase a DoD-negotiated conversion health policy. The current conversion policy is Uniformed Services Voluntary Insurance Program (U.S. VIP) with Mutual of Omaha; current rates, a coverage description, and a reproducible application form may be obtained from each service's coordinator for the former spouse program.

3. **Retired Pay Benefits.** 10 U.S.C. § 1408; and 32 C.F.R. Part 63.

a. The issues of whether military retired pay will be treated as marital or community property (vice as an income component for computing alimony or support payments), and whether and in what amount military retired pay will be divided between the two parties, will be decided *according to state law*; while USFSPA permits military pay to be treated as marital or community property, it does not so mandate.

b. USFSPA does not create a federal right in favor of the former spouse to receive any portion of a member's military retired pay, nor does the statute mandate or suggest a maximum, minimum or typical amount, percentage, or formula for computing a former spouse's share. The court exercising jurisdiction over the case will determine whether to divide military retired pay between the parties and, if so, in what amounts or percentages, using that state's laws, regulations, and procedures, and weighing the evidence and arguments advanced by each of the parties. If a court awards a portion of military retired pay to a former spouse, but the member is still on active duty, the effect of the court order is stayed until retirement occurs - the member will not be forced to retire to satisfy a court order.

c. USFSPA affords a right to receive direct payments from the DFAS center of the portion of a military member's disposable retired pay ordered in favor of a former spouse by a court having appropriate jurisdiction over the member. This direct payment option is limited those former spouses who meet *at least* the 10/10 criteria, is subject to a ceiling of 50% of disposable retired pay, and may require a court order that

expresses the former spouse share either as a whole dollar amount or as a specific percentage of the member's disposable retired pay.

4. **Survivor Benefit Plan (SBP).** 10 U.S.C. §§ 1447(6), 1448(b), and 1450.

a. SBP is an annuity that allows retired members (both active duty and reserve) to provide continued income to named beneficiaries in the event of the retiree's death. A retiring member will be enrolled in SBP unless the member declines to participate. This election must be made before retirement occurs; once a determination whether to participate in SBP is implemented, the election is, with very limited exceptions, irrevocable.

b. A retiring member may elect coverage in favor of a former spouse, either to comply with a court order mandating the election, or to honor an agreement between the parties, or voluntarily. If coverage is elected, the amount of the premium may then be deducted when computing disposable retired pay.

c. If divorce occurs after retirement, and the member did not elect to participate in SBP when retiring, the divorce does not "revive" the option to participate. Thus, state divorce courts should not order these retirees to provide SBP protection for former spouses because Federal law will not permit the retirees to comply.

d. If divorce occurs after retirement and the member had initially elected to participate in SBP when retiring, the dissolution terminates that former spouse's eligibility to be a SBP beneficiary under the member's initial election in favor of the "spouse," and it constitutes a ground for the member to revoke entirely the election to participate in SBP. A court may order continued participation by the member in favor of the former spouse, or the member may wish to continue such coverage, in which case *former spouse coverage* must be elected within one year of the date of the final divorce decree.

e. There is no possibility under current law to split SBP between a current spouse and a former spouse.

C. REFERENCES

Many notes and articles have appeared in law reviews and other professional publications commenting on various aspects of USFSPA. An excellent comprehensive treatment of USFSPA has been published by the Army JAG School: *Uniformed Services Former Spouses' Protection Act (Outline and Reference Materials)*, Publication JA-274.

D. POINTS OF CONTACT

1. USFSPA benefits and eligibility questions.

a. For Navy, contact Coordinator, Former Spouse Program, Bureau of Naval Personnel (PERS 334C), Washington, DC 20370-5641, telephone 1-800-443-9297, (703) 614-4261/3808, DSN 224-4261/3808.

b. For Marine Corps, contact Marine Corps Retired Affairs Office (Code MMSR-6), HQMC, Washington DC 20380-0001, 1-800-336-4649, (703) 614-1958, DSN 224-1958.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2155, DSN 699-2154.

d. For Air Force, contact HQ AFMPC/DPMDOP, Randolph AFB TX 78150-6001, (512) 652-2089, DSN 487-2089.

2. Retired pay questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (Code DG), Kansas City, MO 64197-0001, telephone (816) 926-7103, DSN 465-7103.

c. For Army, contact Retired Pay Operations, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-R), Indianapolis IN 46249-1536, (317) 542-2931, DSN 699-2931.

d. For Air Force, Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

3. SBP questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center, Retired Pay Department (Code JR), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2058, telephone (216) 522-5535, DSN 580-5535.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (DFAS-KC/ER), Kansas City, MO 64197-0001, telephone (816) 926-7196, DSN 465-7196.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2151, DSN 699-2151.

d. For Air Force, contact Defense Finance and Accounting Service - Denver Center (Code RT), Denver CO 80279-5000, (303) 676-6139, DSN 926-6139.

